A **MOHD FADZIL IBRAHIM & ANOR**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
KN SEGARA JCA
BALIA YUSOF WAHI JCA
MOHTARUDIN BAKI JCA
[CRIMINAL APPEAL NO: B-05-34-2008]
C 22 OCTOBER 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1) - Trafficking in 56.85 grams of methamphetamine - Conviction and sentence - Appeal against - Whether there was contradiction in evidence*
D *adduced by prosecution witnesses - Whether agent provocateur's evidence treated with caution - Whether accused persons had knowledge about drugs in envelope - Whether common intention established - Whether defence a bare denial - Whether trial judge erred in making wrong findings of fact - Whether conviction and sentence affirmed*

E ***CRIMINAL PROCEDURE:*** *Appeal - Appeal against conviction and sentence - Discretion of trial judge whether to accept or reject evidence - Whether appellate court reluctant to interfere with findings on questions of facts made by primary trier of fact - Whether trial judge erred*

F ***EVIDENCE:*** *Corroboration - Agent provocateur - Whether evidence corroborated - Whether evidence admissible - Whether agent provocateur presumed unworthy of credit - Dangerous Drugs Act 1950, s. 40*

This was an appeal by the appellants against the decision of the
G High Court in convicting and sentencing them to death under s. 39B(1) of the Dangerous Drugs Act 1952 ('DDA') read together with s. 34 Penal Code for trafficking in 56.85 grams of methamphetamine. Based on information received from an informer, SP3, acting as an agent provocateur, together with
H D L/Kpl Elben, operation and investigation officer ('SP5') and his team, managed to nab the appellants when 15 plastic packets containing the dangerous drugs were seized from the first appellant. Some of the drugs were also found in plastic packets placed in an envelope. However, prior to the arrest, the second
I appellant and SP3 had several negotiations between them in relation to the sale of the drugs. Dissatisfied with the defence

forwarded by the appellants, the High Court judge found the appellants guilty and convicted them. In this appeal, it was submitted by the appellants' respective counsel, *inter alia*, that (i) the trial judge had erred in making a wrong finding of fact; (ii) the trial judge had accepted SP3's evidence; (iii) there were contradiction between the evidence of SP3 and SP5; (iv) SP3's evidence must be treated with caution; and (v) the second appellant had no knowledge as to the content of the envelopes which contained the impugned drugs.

Held (dismissing appeal, affirming decision of High Court) Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) It is trite that every right must be given to the learned trial judge whether to believe and accept the evidence of a witness who has given evidence before her. The trial judge had the audio visual advantage of seeing and assessing the credibility of the witness and was entitled to believe or disbelieve the witness. The discretion to accept the evidence wholly or to reject some is at the discretion of the trial judge, which was to be exercised judiciously. (para 33)

(2) This court's perusal of the trial judge's grounds of judgment revealed that every attention was given to this issue of credibility and acceptability of evidence given by the prosecution witnesses not only of SP3 but also SP5 and SP6. The trial judge had also acknowledged the contradiction in the evidence of SP3, SP5 and SP6. Based on Her Ladyship's judgment, she had not erred in her appraisal of the evidence given by the witnesses. Further, it is also trite that in an appeal which turns on questions of facts, particularly in relation to issues of credibility, this court would be reluctant to interfere with the findings made by the primary trier of fact. (paras 34 & 36)

(3) It was preposterous to suggest that the prosecution had solely relied on the evidence of SP3. There was ample corroborative evidence found to support SP3's evidence, in particular from the evidence of SP5 who was the officer in charge of the operation. Besides that, SP3 was an agent provocateur and his evidence was admissible under s. 40 DDA. The evidence of

A the agent provocateur needs no corroboration and he is not presumed to be unworthy of credit. In totality, the trial judge had not failed to judicially appreciate SP3's evidence. (paras 40, 42 & 43)

B **(4)** The evidence against the second appellant was overwhelming and his denial of knowledge as to the content of the envelope and his denial of any conversation or negotiation with SP3 was without any basis. It was just a plain bare denial. A mere denial was no defence and it was insufficient to raise a C reasonable doubt. (para 48)

(5) The second appellant played a major role in negotiating with SP3 and this culminated in the delivery that took place. It was preposterous for the defence to submit that the first appellant D was a mere delivery boy and that the second appellant was innocently accompanying this delivery boy to deliver the envelopes containing the impugned drugs which they never had any knowledge of. Hence, there was a common intention between both appellants in the commission of the crime. The E learned trial judge had come to the right conclusion and made a right finding on this issue. (para 50)

Obiter:

(1) While it is true that the number of cases fixed for the day is F overwhelmingly high, they were not for statistical or for purposes of meeting the targeted key performance indicator ('KPI'). There is every justification for the bench to intervene or to stop or remind counsel to proceed and move on to other issues should the bench find counsel of being repetitious G and harping on the same issue but fashioning it in different manners. Further, the sanctity and the dignity of the court must be preserved. (paras 55 & 56)

Bahasa Malaysia *Translation Of Headnotes*

H Ini adalah rayuan perayu-perayu terhadap keputusan Mahkamah Tinggi dalam mensabitkan dan menjatuhkan hukuman mati di bawah s. 39B(1) Akta Dadah Berbahaya ('ADB') dibaca bersama-sama s. 34 Kanun Keseksaan kerana mengedar 56.85 gram methamphetamine. Berdasarkan maklumat yang diterima daripada I pemberi maklumat, SP3, menyamar sebagai ejen perangkap, bersama-sama dengan D L/Kpl Elben, pegawai operasi dan siasatan

('SP5') dan pasukannya telah berjaya menangkap perayu-perayu dan 15 bungkusan plastik yang mengandungi dadah berbahaya itu dirampas daripada perayu pertama. Beberapa dadah telah dijumpai di dalam bungkusan plastik yang diletakkan di dalam sampul surat. Walau bagaimanapun, sebelum penangkapan, perayu kedua dan SP3 telah mengadakan beberapa rundingan di antara mereka berkenaan penjualan dadah itu. Tidak puas hati dengan pembelaan pihak perayu, hakim Mahkamah Tinggi mendapati bahawa perayu-perayu bersalah dan mensabitkan mereka. Dalam rayuan di sini, ianya dihujahkan oleh peguam pihak perayu masing-masing, antara lain, bahawa (i) hakim bicara khilaf dalam membuat pendapatan fakta yang salah; (ii) hakim bicara menerima keterangan SP3; (iii) terdapat penyanggahan di antara keterangan SP3 dan SP5; (iv) keterangan SP3 mestilah ditimbang dengan cermat; dan (v) perayu kedua tidak mempunyai pengetahuan berkenaan kandungan sampul surat yang mempunyai dadah tersebut.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)
Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) Adalah mantap bahawa setiap hak mestilah diberi kepada hakim bicara sama ada untuk percaya atau menerima keterangan seseorang saksi yang telah memberi keterangan di hadapan beliau. Hakim bicara mempunyai manfaat penglihatan audio untuk melihat dan menilai kredibiliti saksi dan layak untuk percaya atau tidak mempercayai saksi itu. Budibicara untuk menerima keterangan sepenuhnya atau menolak beberapa adalah berdasarkan budibicara hakim bicara, yang perlu dilaksanakan secara penuh kehakiman.

(2) Penelitian mahkamah ini berdasarkan alasan penghakiman hakim bicara mendedahkan bahawa perhatian telah diberikan terhadap isu kredibiliti dan kebolehterimaan keterangan saksi-saksi pendakwaan, bukan sahaja bagi SP3 malah juga untuk SP5 dan SP6. Hakim bicara juga telah mengakui penyanggahan dalam keterangan SP3, SP5 dan SP6. Berdasarkan penghakiman yang arif hakim, beliau tidak khilaf dalam penilaiannya berkenaan keterangan yang diberi oleh saksi-saksi. Lagipun, ianya adalah mantap bahawa dalam suatu rayuan yang bertukar menjadi persoalan fakta, terutamanya berkenaan isu kredibiliti, mahkamah ini enggan untuk campur tangan dengan pendapatan yang dibuat oleh pengadil utama fakta.

A **(3)** Adalah mustahil untuk mencadangkan bahawa pihak pendakwaan hanya telah bergantung kepada keterangan SP3. Terdapat banyak keterangan sokongan yang dijumpai untuk menyokong keterangan SP3, terutamanya daripada keterangan SP5 yang merupakan pegawai yang bertanggungjawab
B terhadap operasi itu. Selain daripada itu, SP3 merupakan ejen perangkap dan keterangan beliau diterima di bawah s. 40 ADB. Keterangan ejen perangkap tidak memerlukan sokongan dan beliau tidak dianggap sebagai tidak boleh dipercayai. Secara keseluruhannya, hakim bicara tidak gagal untuk
C menghargai keterangan SP3.

(4) Keterangan terhadap perayu kedua adalah banyak dan penafian pengetahuan berkenaan kandungan sampul surat dan penafian beliau berkenaan apa-apa percakapan atau pun rundingan
D dengan SP3 adalah tanpa asas. Ianya hanya semata-mata penafian kosong. Penafian kosong bukanlah pembelaan dan ianya tidak mencukupi untuk membangkitkan keraguan munasabah.

E **(5)** Perayu kedua memainkan peranan besar di dalam rundingan dengan SP3 dan ini menyebabkan penghantaran yang telah berlaku. Ianya adalah mustahil untuk pembelaan berhujah bahawa perayu pertama hanya merupakan budak penghantar dan perayu kedua yang tidak mengetahui apa-apa hanya
F menemani budak penghantar untuk menghantar sampul surat yang mengandungi dadah tersebut di mana mereka tidak mempunyai sebarang pengetahuan mengenainya. Oleh itu, terdapat niat bersama di antara kedua-dua perayu dalam menjalankan jenayah ini. Yang arif hakim telah mencapai
G kesimpulan betul dan membuat pendapatan betul berkenaan isu ini.

Obiter:

(1) Sedangkan ianya adalah benar bahawa bilangan kes yang
H ditetapkan untuk sehari adalah tinggi, ianya bukanlah untuk tujuan statistik atau pun bagi kehendak mencapai sasaran petunjuk-petunjuk prestasi utama (KPI). Terdapat justifikasi bagi anggota kehakiman untuk mencelah atau untuk berhenti atau pun untuk mengingati peguam untuk meneruskan kepada
I isu-isu lain jika anggota kehakiman mendapati peguam berulang-alik menyentuh isu yang sama tetapi menunjukkannya dalam cara berlainan. Tambahan, kesucian dan kehormatan mahkamah mestilah dipelihara.

Case(s) referred to:
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Ashmore v. Corp. of Lloyd's [1992] 2 All ER 486 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***
Lim Guan Eng v. PP & Other Appeals [1998] 3 CLJ 769 CA ***(refd)***
Namasiyiam Doraisamy & Ors v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
PP v. Mohamed Halipah Adan [1981] CLJ 92; [1981] CLJ (Rep) 238 HC ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
Seraman A Adipan v. PP [2009] 5 CLJ 123 CA ***(refd)***
Wan Marzuki Wan Abdullah v. PP [2008] 4 CLJ 631 CA ***(refd)***
Ye Wei Gen v. PP [1999] 4 SLR 101 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 39B(1), 40
Penal Code, s. 34

For the 1st appellant - Gobind Singh Deo (S Prakash with him); M/s Gobind Singh Deo & Co
For the 2nd appellant - Muhammad Haijan Omar (Hisham Nazir with him); M/s Nazir & Co
For the respondent - Siti Rafidah; DPP

Reported by Kumitha Abd Majid

JUDGMENT

Balia Yusof Wahi JCA:

[1] Both the appellants were charged for trafficking in dangerous drugs to wit 56.85g of methamphetamine. They were charged under s. 39B(1) of the Dangerous Drugs Act 1952 (DDA) read together with s. 34 of the Penal Code. They were found guilty by the High Court and sentenced to death. Hence this appeal.

The Prosecution's Case

[2] On 1 November 2004 SP3 received an information relating to a drug offence from an informer. SP3 was given a phone number of the alleged drug trafficker. SP3 called the number given and spoke to a person who introduced himself as Lan.

[3] Subsequently, on 5 November 2004 at about 6pm the said person (Lan) contacted SP3 and requested to meet him. SP3 informed his superior officer SP5 who then assembled his men at the Shell station at Paya Jaras in Sungai Buloh Selangor. There, SP5 briefed his men with SP3 acting as an agent provocateur and accompanied by D L/Kpl Elben.

[4] As arranged, SP3 was to meet the alleged trafficker at the Petronas station with D L/Kpl Elben while SP5 and his team will be making an observation.

[5] At the Petronas station, SP3 and D L/Kpl Elben waited in their car, WJQ 1448. Soon they were approached by two male Malay one of whom introduced himself as Lan while the other merely shook hands with SP3. During the meeting, SP3 acted as a buyer for ganja and syabu and a discussion took place between SP3 and Lan. SP3 was told that ganja was not available but a packet of syabu costs RM750 and a total of 15 packets were available for a price of RM11,250. SP3 tried to haggle for the price but was not agreed to by Lan. Lan was later identified as the second appellant. The second appellant asked for the money but was told by SP3 that he will only get it when the drugs were delivered to him.

[6] During the negotiation which according to SP3 took about 1 1/2 hours, the second appellant made a few phone calls using his handset. The second appellant was also seen going back and forth to a car, a Nissan AD Resort from which he and the other man came. Both D L/Kpl Elben and the other man who came with the second appellant were not involved in the negotiation between SP3 and the second appellant.

[7] The second appellant then asked SP3 to follow him to Selayang to get the supply of the drug. SP3 refused to follow the second appellant in the Nissan AD Resort car but followed him in his own car. Meanwhile, SP5 was kept informed and made observation from a distance.

[8] While following the said Nissan AD Resort car, SP3 saw the second appellant was with two other passengers. SP3 was led to a place in front of the Sekolah Agama Jalan 26 Selayang Baru, Batu Caves and stopped there. The second appellant came over to his car and again asked for the money. Again this was refused

by SP3 as he wanted to see the drugs first. The second appellant then went back to the Nissan AD Resort car parked in a dark spot not far from SP3's car. Sometime later, the second appellant came back to SP3's car with another person who was later identified as the first appellant.

[9] This time around, the first appellant asked SP3 for the money and was told that the money will only be handed over once SP3 gets to see the drugs. The first appellant then showed SP3 an envelope with five plastic packets containing the drugs and again asked for the money. Upon being satisfied that the five plastic packets contained the drugs, SP3 and D L/Kpl Elben got out of their car as a pre arranged sign for SP5 and his men to move in and effect the arrest.

[10] SP3 introduced himself as a police officer and arrested the first appellant while D L/Kpl Elben arrested the second appellant assisted by SP5 and his men. There was a scuffle between the police party and the two appellants at the time of the arrest.

[11] At the time of the arrest by SP5, the first appellant was still holding the envelope containing the five plastic packets and this was seized by SP5. Two other envelopes each containing five plastic packets were also seized from the back trousers pocket of the first appellant. Altogether 15 plastic packets were seized from the first appellant in three envelopes but nothing was found on the second appellant's person.

[12] Upon analysis by the government chemist, SP2, the 15 plastic packets were found to contain 56.85g of methamphetamine, a dangerous drug as defined under s. 2 of the DDA.

[13] At the end of the prosecution's case, the learned trial judge found a *prima facie* case against the appellants and ordered them to enter their defence.

The Defence Case

[14] The first appellant stated in his defence that on 5 November 2004 at about 9pm he went to Lan's house in Kuang, Sungai Buloh. Lan's full name is Noor Azlan b. Ibrahim whom he identified as the second appellant. They had planned to go to an entertainment centre. While at the second appellant's house, A

A Nissan AD Resort car came and he was told by the second appellant that his cousin named Halim came together with another Fariz and Mahathir. The first appellant was introduced to them and thereafter they went for a drink at a 'gerai' in Simpang Empat Sungai Pelong in the Sungai Buloh area. After the drink, Halim
B also decided to follow them to the entertainment centre but before that Halim said he wanted to meet his friend at the Petronas station in Paya Jaras. All five of them then decided to go there.

[15] At the Petronas station, Halim asked him, the second
C appellant and Fariz to remain in the car while Halim and Mahathir got out. Some 40 minutes later, Halim and Mahathir came back and told him, the second appellant and Fariz that they all will go to a disco together with the friend whom Halim has met at the Petronas station. However, before proceeding to the disco, Halim
D requested him and the second appellant to go to Selayang to meet that friend again.

[16] Upon reaching Selayang, Halim stopped his car by the roadside and asked him to send over a few envelopes to the car which had stopped behind their car. The first appellant then asked
E the second appellant to accompany him to send over the envelopes and immediately upon reaching the said car both of them were arrested and brought to the police station. At the same time he saw Halim speeding off in his car.

F **[17]** The first appellant denied talking or discussing with the occupants of the other car and denied any knowledge about the contents of the envelopes which were given to him by Halim. He also denied attempting to sell drugs to the occupant of the other car before his arrest.

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[18] The second appellant's defence is very much similar and has the same tempo to the one put forward by the first appellant from start to finish. He gave the same story and narration of events that took place that night as given by the first appellant. Like the
H first appellant, he stated that at the Petronas station, Halim and Mahathir got out of the car they were travelling in and spoke to a person in a Waja car, SP3. Halim and Mahathir were there for about 40 minutes. He also confirmed that the first appellant requested him to accompany him to deliver the envelopes to the
I car which had stopped behind their car in Selayang.

[19] In the light of the appellant's defence with respect to the person named Halim, Fariz and Mahathir who were never mentioned during the prosecution's case in particular when SP6, the investigating officer who was never cross-examined on this issue, the learned trial judge allowed the prosecution's application to call rebuttal evidence. SP6 was recalled and the recording officer, C/Inspector Mohamad Mansor b. Ismail who recorded the first appellant's statement was also called as a rebuttal witness.

[20] Upon being recalled, SP6 testified that both the appellants never informed him about the existence of these persons Halim, Mahathir and Fariz. While Chief Insp. Mohamed Mansor b. Ismail stated that at no time during the recording of his statement did the first appellant ever made any mention about the names of Halim, Mahathir and Fariz.

[21] In so far as the second appellant is concerned, he confirmed during re-examination by his counsel that he could not remember whether he did inform the police about Halim, Mahathir and Fariz. He simply could not remember because it happened a long time ago.

[22] At the end of the defence case, the learned trial judge held that the defence of the appellants has failed to cast a reasonable doubt on the prosecution's case and both the appellants were found guilty, convicted and sentenced to death.

[23] The appeal before us now is both against the said conviction and sentence by the learned trial judge.

The Appeal

[24] Mr Gobind Singh Deo, learned counsel for the first appellant submitted that the learned trial judge has erred in making a wrong finding of fact against his client in that:

(a) the first appellant had spoken to SP3, and

(b) the first appellant produced the envelope and opening it to show to SP3 the contents.

[25] Both findings of facts were based on the evidence of SP3. He further submitted that there is a contradiction in the evidence of SP3 with the evidence of SP5 and SP6 which was acknowledged by the learned trial judge but still Her Ladyship chose to accept the evidence of SP3.

[26] On the issue of whether the first appellant had spoken to SP3 or not, at p. 463 of the appeal record the learned trial judge made a finding that:

> Kedua-dua tertuduh hadir di tempat kejadian kedua semasa dadah berbahaya dalam sampul surat pertama ditunjukkan dan diserahkan kepada SP3 oleh tertuduh 1 dan tertuduh 1 telah meminta wang pembelian daripada SP3.

[27] Later, at p. 466 of the appeal record the learned trial judge further made a finding that:

> Tertuduh 1 telah memegang satu sampul surat di tangan kanannya dan membuka sampul surat tersebut dan menunjukkan kepada SP3 kandungan dadah syabu yang berada di dalamnya iaitu 5 peket sahaja. Ketika itu SP3 masih berada di dalam kereta. Setelah tertuduh 1 menunjukkan 5 peket barang yang disyaki dadah jenis syabu itu yang berada di dalam sampul surat itu tertuduh 1 telah meminta wang daripada SP3.

[28] It must be noted that the "di tempat kejadian kedua" referred to by the learned trial judge is at Selayang where the delivery of the drugs were to take place.

[29] We have perused the evidence of SP3 with a fine tooth comb and we found no merit in the learned counsel's argument. In his evidence, SP3 confirmed that the first appellant spoke to him by asking for the money. This evidence has been accepted by the learned trial judge. True to Mr Gobind's submissions, both findings were based on the evidence of SP3. But Mr Gobind's real complaint appears to be against the reason given by the learned trial judge in accepting the evidence of SP3. He is particularly unhappy with the learned trial judge saying:

> mahkamah mempercayai dan menerima keterangan SP3.

[30] Mr Gobind also took issue with the learned trial judge's reason for accepting the evidence when Her Ladyship stated at p. 464 of the appeal record thus:

> Mahkamah berpuas hati daripada cara mereka memberi keterangan …

[31] Learned counsel confessed that he was really mystified by this phrase and wondered what the learned trial judge meant.

[32] We pause here to note and ask the very pertinent question ie, is the learned trial judge not entitled to do and say that? A

[33] It is trite that every right must be given to the learned trial judge whether to believe and accept the evidence of a witness who has given evidence before her. The learned trial judge has the audio visual advantage of seeing and assessing the credibility of the witness. She is entitled to believe or disbelieve the witness. She may accept his evidence wholly or reject some. The discretion is solely hers and of course it goes without saying that that discretion must be exercised judiciously. The learned trial judge simply meant that she has seen, heard and observed the witnesses and was satisfied with the manner the witnesses were giving evidence. One should not have any difficulty in understanding what the learned trial judge meant. It was stated in plain simple Bahasa Malaysia. B C D

[34] We have no difficulty in allaying the fear and concern expressed by the learned counsel. Our perusal of the learned trial judge's grounds of judgment revealed that every attention was given to this issue of credibility and acceptability of the evidence given by the prosecution witnesses not only of SP3 but also SP5 and SP6. The learned trial judge has also acknowledged the contradiction in the evidence of SP3, SP5 and SP6. In this instance, we are constrained to reproduce what the learned trial judge has stated at pp. 463 – 464 of the appeal record. Beginning at p. 463, Her Ladyship stated: E F

> Kreditabiliti SP3
>
> Mahkamah mempercayai dan menerima keterangan SP3 kerana keterangan SP3 berkenaan dengan transaksi penjualan dan pembelian dadah, tangkapan dan rampasan adalah disokong oleh keterangan Cif Razali a/l Selvaraju, SP5, yang ada bersama-sama SP3 sepanjang masa kejadian iaitu daripada malam 5 November 2004 sehinggalah tangkapan ke atas tertuduh 1 dan tertuduh 2 pada 6 November 2004 jam lebih kurang 1.00 pagi di tempat kejadian kedua. Segala pergerakan dan tindakan SP3 dimaklumkan kepada SP5. G H
>
> Mahkamah menerima dan mempercayai keterangan SP3 walaupun terdapat percanggahan di antara keterangan SP3 dan keterangan SP5 dan keterangan SP6. I

A Mahkamah berpuas hati daripada cara mereka memberi keterangan bahawa punca percanggahan ialah ingatan yang berbeza dan bukan kerana mereka telah bercakap bohong. Oleh itu keterangan mereka tidak patut ditolak sama sekali. SP3 juga telah memberi penjelasan tentang mengapa beliau tidak dapat ingat semua perkara yang
B dikatakan oleh beliau dan oleh tertuduh 2 semasa pengurusan membeli dadah berlaku. Beliau hanya memilih untuk mengingati apa yang penting iaitu yang berkaitan dengan jual beli dadah sahaja. Sebabnya ialah beliau telah diamanahkan untuk menguruskan projek jual beli dadah oleh SP5, Cif Insp. Razali dan itu merupakan kali pertama beliau ditugaskan untuk urusan jual beli
C dadah. Itu adalah sebab mengapa beliau tidak merekod perbualan dan soalan dan juga tidak ada sesiapa pegawai yang nasihatkan beliau untuk merekodkan apa yang disoal dan dijawab berkaitan urusan jual beli dadah.

D **[35]** On the contradiction in the evidence of SP3 and SP5, the learned trial judge had addressed her mind to the issue as can be discerned from her judgment at p. 498 of the appeal record which says:

Walau pun terdapat 2 percanggahan yang wujud atas keterangan
E SP3 dan SP5 seperti berikut:

(1) SP3 mengatakan bahawa terdapat seorang lain (bukan tertuduh 1) berada di stesyen minyak Petronas manakala SP5 mengatakan nampak tertuduh 1 bersama tertuduh 2 di stesyen minyak Petronas tersebut; dan

F

(2) SP3 mengatakan bahawa SP5 tidak mengeluarkan isi kandungan sampul surat di tempat kejadian manakala SP5 mengatakan beliau telah mengeluarkan isi kandungan sampul surat semasa membuat pemeriksaan di tempat kejadian.

G pada pendapat mahkamah kedua-dua percanggahan tersebut adalah tidak material dan menunjukkan bahawa mereka adalah saksi-saksi yang telah bercakap benar dan bahawa mereka mempunyai ingatan yang berbeza dan bahawa mereka tidak berpakat dalam memberi keterangan mereka.

H (Sila lihat kes *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155 (FC) kes *Khoon Chye Hin v. PP* [1961] 27 MLJ 105 di muka surat 106-107, kes *Mohamed Alias v. PP* [1983] 2 MLJ 172 di muka surat 172-173 dan kes *Pie bin Chin v. PP* [1985] 1 MLJ 234 di muka surat 235-236.

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[36] We have given anxious consideration to the above passages and conclude that the learned trial judge has not erred in any manner in her appraisal of the evidence given by the witnesses. It is part and parcel of the exercise of her judicial function and appreciation of the matter before her. We are not at liberty to differ for the simple reason that there is no compelling reason for us to do so (*Herchun Singh & Ors v. PP* [1969] 1 LNS 52, *Ye Wei Gen v. PP* [1999] 4 SLR 101). It is also trite that in an appeal which turns on questions of facts particularly in relation to issues of credibility, this court will be reluctant to interfere with the findings made by the primary trier of fact. (See: *Wan Marzuki Wan Abdullah v. PP* [2008] 4 CLJ 631, *Andy Bagindah v. PP* [2000] 3 CLJ 289, *Sainal Abidin Mading v. PP* [1999] 4 CLJ 215, *Seraman A Adipan v. PP* [2009] 5 CLJ 123).

[37] Perhaps it would be fitting to echo the words of Gopal Sri Ram JCA (as he then was) in *Lim Guan Eng v. PP & Other Appeals* [1998] 3 CLJ 769, thus:

> Witnesses are but human. Testimony may often be coloured by emotion, benign or malicious. Not all witnesses are devoid of bias of one sort or another. Recollection of events is seldom, if ever perfect. Two or more persons witnessing the same incident may give varying, yet truthful, accounts of it according to their perception. There are so many other imponderables.

[38] We have given every consideration to Mr Gobind's submissions. However we are not persuaded. We find no appealable error on the part of the learned trial judge and will not interfere with her findings on the issues raised by the learned counsel.

[39] Next, we were urged by Mr Gobind to go on an exercise to re-evaluate the credibility and reliability of all the evidence adduced so as to determine whether the ingredients of the offence have been established. Relying on *Balachandran v. PP* [2005] 1 CLJ 85, learned counsel submitted that the learned trial judge has failed at the close of the case for the prosecution to undertake a positive evaluation of the credibility and reliability of the prosecution's case. This is especially so when only the evidence of one witness, that is SP3, formed the thrust of the prosecution's case. SP3's evidence must therefore be treated with caution.

A Learned counsel further submitted that it is wholly unsafe to convict the first appellant on the charge preferred against him and in fact it was submitted that the learned trial judge should have found no *prima facie* case established.

B **[40]** We found no merits in Mr Gobind's submissions. In the first place, it is preposterous to suggest that the prosecution solely relied on the evidence of SP3. We found ample corroborative evidence to support the evidence of SP3, in particular from the evidence of SP5. SP5 was the operation and investigation officer C at the narcotics division of the Selangor IPK. For this case, he was the officer in charge of the operation and SP3 acted on his instructions. He and his team was doing the observation at the Petronas station and was in constant contact with SP3 while the negotiations between SP3 and the first appellant was taking place. D SP5 also followed SP3 to Selayang for the delivery of the drugs to take place and subsequently effected arrest on the second appellant together with the help of D L/Kpl Elben. SP5's evidence corroborates in material parts the evidence of SP3. SP5 seized the envelopes from the first appellant and was observing the first E appellant opening one end of the envelope and showing the contents to SP3. SP5 also opened and saw the contents of the three envelopes.

[41] As we have indicated earlier, the learned trial judge had F acknowledged that there were certain discrepancies in the evidence of SP3 and SP5 which Her Ladyship had noted at p. 498 of the appeal record. Her Ladyship found the discrepancies or contradictions to be minor and inmaterial. We are not at liberty to differ from Her Ladyship.

G **[42]** We have not failed to note that SP3 was an agent provocateur and his evidence was admissible under s. 40 of the DDA. The learned trial judge was fully conscious of this fact and was also well appraised on the law in referring to the authorities of *Namasiyiam Doraisamy & Ors v. PP & Other Cases* [1987] 1 H CLJ 540; [1987] CLJ (Rep) 241, *PP v. Mohamed Halipah Adan* [1981] CLJ 92; [1981] CLJ (Rep) 238. The evidence of the agent provocateur needs no corroboration and he is not presumed to be un worthy of credit.

I **[43]** In totality, we are satisfied that the learned trial judge has not failed to judicially appreciate the evidence of SP3.

[44] As for the second appellant, the learned counsel Mr Hisham Nizar intimated to us that he wished to adopt fully the submissions of Mr Gobind Singh Deo on the issue of credibility of SP3. Mr Hisham Nizar's other ground of appeal is on the issue of knowledge and common intention.

[45] It was submitted that the second appellant has no knowledge as to the content of the envelopes which contain the impugned drugs and about the alleged conversation and negotiation between him and SP3 prior to his arrest. The defence of the second appellant is that he went to the Petronas station with his friends. There were five of them in the car, Halim, Mahathir, Fariz, the first appellant and himself. He remained in the car and did not know what had transpired and only later accompanied the first appellant to hand over the envelopes to the occupant of the other car parked behind their car. He merely acceded to the first appellant's request for him to come along. The second appellant did not run away when the first appellant was arrested by SP3 and this conduct is consistent with his innocence.

[46] The learned trial judge disbelieved the second appellant's defence and stated at pp. 499 – 500 of the appeal record:

> Mahkamah juga tidak mempercayai pembelaan tertuduh 2 bahawa beliau tidak berbincang dan bersetuju dengan SP3 untuk menjual dadah tersebut kepada SP3 di tempat kejadian pertama dan bahawa beliau tidak menyuruh SP3 untuk mengikut kereta yang beliau naiki ke tempat kejadian kedua di mana beliau telah meminta wang pembelian dadah tersebut daripada SP3 dan bahawa beliau tidak membawa tertuduh 1 ke kereta Proton Waja di mana SP3 sedang berada dengan tujuan untuk menunjukkan dan menyerahkan dadah tersebut dalam 3 sampul surat P11, P13 dan P15 kepada SP3 supaya SP3 akan membuat pembayaran wang sebanyak RM11,250 yang telah dipersetujui di antara SP3 dan tertuduh 2 di stesyen minyak Petronas.

[47] The evidence of SP3 is most damning against the second appellant. It may be true that during the episode at Selayang, the second appellant was not in possession of the envelopes containing the impugned drugs but the first appellant was. The evidence of SP3 which the court has accepted clearly established that it was the second appellant who asked SP3 and D L/Kpl Elben to follow him to Selayang after the negotiations at the

A Petronas station. At Selayang the second appellant again asked to see the money from SP3. Later, the second appellant came over again to SP3's car with the first appellant who handed over to SP3 the envelope containing five plastic packets which was believed to contain the impugned drugs.

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[48] In the light of the above, we find the submissions of the learned counsel to be without merits. The evidence against the second appellant is overwhelming and his denial of knowledge as to the content of the envelope and his denial of any conversation
C or negotiation with SP3 either at the Petronas station or at Selayang is without any basis. It is just a plain bare denial. A mere denial is no defence and it is insufficient to raise a reasonable doubt.

D **[49]** On common intention, En. Hisham Nazir reiterated that since the second appellant denies any role in the transaction except to accompany the first appellant to hand over the envelopes to SP3 of which he has no knowledge as to its contents, there can never be any common intention formed.

E **[50]** As can be gleaned from the evidence, the second appellant played a major role in negotiating with SP3 at the Petronas station and this culminated in the delivery that took place at Selayang. The transaction started at the Petronas station and continued to Selayang with each of the appellants playing their
F respective roles. We are told and made to believe that the first appellant was a mere delivery boy and that the second appellant was innocently accompanying this delivery boy to deliver the envelopes containing the impugned drugs which they never had any knowledge of to SP3. This is preposterous. We are satisfied
G on perusal of the records that there was common intention between both the appellants in the commission of the crime. We found the learned trial judge has come to the right conclusion and made a right finding on this issue. We do not find it useful to restate the law and the plethora of cases on common intention and
H neither do we find it necessary to reproduce what the learned trial judge has stated in her grounds of judgment on this issue. However, as a point of reference, and for brevity we note that the learned trial judge has sufficiently dealt with this issue at pp. 461-463 of the appeal records. In the circumstances, we are
I constrained to say that the submissions of the learned counsel is totally devoid of any merits.

[51] We are not persuaded and we are not with the appellants. We agree with the findings made by the learned trial judge and the appeal by both the appellants is hereby dismissed. The conviction and sentence by the high court is affirmed.

[52] By way of postscript, we feel constrained to say a few words as reminders to counsels of their conduct in championing their clients' cause.

[53] The panel was accused of rushing counsel through his submissions in order to meet the KPI set by the powers that be. We were further told by the learned counsel that, "judges are paid to listen and lawyers are paid to talk" or words to that effect.

[54] Lest one forgets, we are mere servants of justice. We administer justice. We dispense justice.

[55] We wish to put it on record that while it is true that the number of cases fixed for the day is overwhelmingly high (which we, the panel, have no say) we are very sure that they are not for statistical or for purposes of meeting the targeted KPI as alleged. For the avoidance of any doubt, we wish to state that we are not aware of any KPI ever being set for disposal of appeals fixed before us.

[56] Judges must have the patience to listen, that is all true. But judges too, do not sit on the bench stone cold. There is every justification for the bench to intervene or to stop or remind counsels of the need to proceed and move on to other issues should the bench find counsel being repetitious and harping on the same issue but fashioning it in different manners. That is the domain of the bench. We wish to quote the observations made by Lord Templeman in *Ashmore v. Corp of Lloyd's* [1992] 2 All ER 486:

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the Judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner.

A **[57]** To borrow the words of Denning LJ, we do not fear criticism, nor do we resent it. But to level such accusation against the bench has certainly crossed the borders of criticism and decorum and what more when a challenge was made to the bench to cite the learned counsel for contempt. We chose not to.
B Respect is not something that is conferred or is received on demand but has to be earned. We are intolerant of any conduct lacking in courtesy and will never condone such conduct. The sanctity and the dignity of the court must be preserved. The duty of counsel to advance their client's cause is not without
C boundaries and of upmost importance, in keeping with the traditions of the noble profession, counsels must act and carry themselves honourably in and outside courts.

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